

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES COURTNEY and CLIFFORD
COURTNEY,

Plaintiffs,

v.

JEFFREY GOLTZ, et al.,

Defendants.

NO: 11-CV-0401-TOR

ORDER GRANTING MOTION TO
DISMISS

BEFORE THE COURT is Defendants' motion to dismiss for failure to state a claim (ECF No. 7). The Court heard oral argument on the motion on April 12, 2012. Michael E. Bindas and Jeanette Petersen appeared on behalf of the Plaintiffs, James Courtney and Clifford Courtney. Assistant Attorney General Fronda Woods appeared on behalf of the Defendants, Jeffrey Goltz, Patrick Oshie, Philip Jones, and David Tanner. The Court has reviewed the motions, the responses, the record and files herein and is fully informed.

BACKGROUND

This lawsuit is a challenge to certain Washington statutes and administrative regulations that require an operator of a commercial ferry to obtain a certificate of “public convenience and necessity” from the Washington Utilities and Transportation Commission (“WUTC”) before commencing operations. Plaintiffs allege that these statutes and regulations, as applied to their proposed ferry services on Lake Chelan, violate their right “to use the navigable waters of the United States” under the Privileges or Immunities Clause of the Fourteenth Amendment. Defendants, all members of the WUTC, have moved to dismiss the Complaint for failure to state a claim on the ground that Plaintiffs do not have a Fourteenth Amendment right to operate a commercial ferry on Lake Chelan.

FACTS

The following facts are drawn from Plaintiff’s Complaint and are accepted as true for purposes of this motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiffs James Courtney and Clifford Courtney (“the Courtneys”) live in Stehekin, Washington. Stehekin is a small, unincorporated community of approximately 75 residents located at the northwestern-most tip of Lake Chelan. Stehekin is a very isolated community: the only means of accessing the town are by boat, seaplane, or on foot. Most residents and visitors reach Stehekin via a ferry

1 operated by Lake Chelan Boat Company. At present, this is the only commercial
2 ferry operating on the lake.

3 The Courtneys would like to establish a competing ferry service on Lake
4 Chelan. They believe that a competing service is needed for two main reasons.
5 First, they believe that a second ferry, based in Stehekin, would better serve the
6 needs of Stehekin residents than the existing ferry based in Chelan.¹ Second, they
7 believe that a second ferry would allow more tourists and visitors to reach
8 Stehekin, thereby increasing patronage of Stehekin businesses—many of which are
9 owned by the Courtneys. To date, however, the Courtneys have been unable to
10 obtain the requisite certificate of “public convenience and necessity” from the
11 WUTC or otherwise obtain permission to operate a ferry on Lake Chelan.

12 The Courtneys’ efforts to establish a competing ferry service have taken
13 several forms. First, in 1997, James Courtney submitted a formal application to
14 the WUTC for a certificate of “public convenience and necessity” pursuant to
15 RCW 81.84.010 and 020. The WUTC’s evaluation of this application culminated
16 in a two-day evidentiary hearing at which the WUTC took testimony from James

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18 ¹ The city of Chelan is located at the southeastern-most tip of Lake Chelan. The
19 distance between Chelan and Stehekin is approximately fifty-five (55) miles by
20 boat.

1 and others about (1) the need for an additional ferry; and (2) the financial viability
2 of the proposed service.² The WUTC ultimately denied James's application,
3 finding that the proposed service was not required by "the public convenience and
4 necessity," and that, in any event, James lacked the financial resources to sustain
5 the proposed service for twelve months. The WUTC further concluded that James
6 had failed to carry his statutory burden of establishing that the incumbent carrier
7 "ha[d] failed or refused to furnish reasonable and adequate service." *See* RCW
8 81.84.020(1).

9 Second, beginning in 2006, James attempted to establish an "on-call boat
10 transportation service" based in Stehekin. Because James intended to use docks
11 owned by the United States Forest Service in conjunction with this service, he

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13 ² Before issuing a certificate of "public convenience and necessity," the WUTC is
14 required to determine that an applicant "has the financial resources to operate the
15 proposed service for at least twelve months" and to evaluate "[r]idership and
16 revenue forecasts; the cost of service for the proposed operation; an estimate of the
17 cost of the assets to be used in providing the service; a statement of the total assets
18 on hand of the applicant that will be expended on the proposed operation; and a
19 statement of prior experience, if any, in such field by the applicant." RCW
20 81.84.020(2).

1 applied to the Forest Service for a “special use permit.” The Forest Service
2 subsequently contacted the WUTC to verify that James’s proposed use of its docks
3 would comply with state law. In October of 2007, WUTC staff advised the Forest
4 Service that the proposed service was exempt from the statutory “public
5 convenience and necessity” requirement. In March of 2008, however, WUTC staff
6 reversed course and advised James directly that he would need to obtain a
7 certificate before commencing his on-call service.

8 Four months later, in July of 2008, WUTC staff reversed course once again
9 and advised James that the on-call service would be exempt from the certificate
10 requirement. The Forest Service, recognizing the apparent confusion among the
11 WUTC staff, subsequently requested an “advisory opinion letter” on the issue from
12 Defendant David Danner in August of 2009. For reasons that are unclear from the
13 existing record, Defendant Danner declined to respond.

14 Also in 2008, Clifford Courtney contacted the WUTC and proposed two
15 alternative boat transportation services. The first proposal was a “charter” service
16 whereby Clifford would hire a private boat to transport patrons of his lodging and
17 river rafting businesses between Chelan and Stehekin. The second proposal was a
18 service whereby Clifford would “shuttle” his customers between Chelan and
19 Stehekin in his own private boat.

1 In September of 2008, Clifford sent a letter to Defendant Danner seeking
2 guidance about whether either proposed service would require a certificate of
3 “public convenience and necessity.” Defendant Danner responded that, in his
4 opinion, both services would require a formal certificate. Specifically, Defendant
5 Danner opined that even private boat transportation, offered exclusively to paying
6 customers of Clifford’s lodging and river rafting businesses, would be a service
7 “for the public use for hire” for which a formal certificate was required pursuant to
8 RCW 81.84.010. Defendant Danner did, however, inform Clifford that his opinion
9 was merely advisory in nature and that Clifford was free to seek a formal ruling on
10 the issue from the full Commission.

11 Frustrated by the WUTC’s responses to their formal application and
12 subsequent proposals, the Courtneys contacted the Governor of the State of
13 Washington and several state legislators in February of 2009. The Courtneys
14 explained the perceived need for a competing ferry service on Lake Chelan and
15 urged their legislators to relax the ferry operator certification requirement. In
16 response, the State Legislature directed the WUTC to study the appropriateness of
17 statutes and regulations governing commercial ferry operations on Lake Chelan.
18 Pursuant to this mandate, the WUTC studied the issue and delivered a formal
19 report to the State Legislature in January of 2010. *See Washington Utilities and*
20 *Transportation Commission, Appropriateness of Rate and Service Regulation of*

1 *Commercial Ferries Operating on Lake Chelan: Report to the Legislature*

2 *Pursuant to ESB 5894*, January 14, 2010 (hereinafter “Ferry Report”).³

3 In this report, the WUTC concluded, *inter alia*, that the existing ferry
4 operator was providing satisfactory service and that no modification of the existing
5 regulations was therefore necessary. The WUTC did, however, discuss the
6 potential for “limited competition” by private carriers within the confines of the
7 existing statutory and regulatory framework:

8 There are three ways for the Commission to allow some limited
9 competition with an incumbent provider’s service: (1) by defining an
10 incumbent’s protected geographic territory in a narrow fashion, (2) by
11 concluding that the incumbent has failed to meet a public need that the
12 applicant proposes to meet, or (3) by declining to require a certificate
13 for certain types of boat transportation services that are arguably
14 private rather than for public use.

15 Ferry Report at 12. Although the WUTC believed that it was “unlikely that . . .
16 any of these theories could be relied upon to authorize competing services on Lake
17 Chelan,” it nevertheless concluded that,

18 ³ Available at:

19 [http://www.wutc.wa.gov/webdocs.nsf/d94adfab95672fd98825650200787e67/b18a8709b0fbaba2882576b100799b46/\\$FILE/Appropriateness%20of%20Rate%20&%20Service%20Regulation%20of%20Commercial%20Ferries%20Operating%20on%20Lake%20Chelan_2010.pdf](http://www.wutc.wa.gov/webdocs.nsf/d94adfab95672fd98825650200787e67/b18a8709b0fbaba2882576b100799b46/$FILE/Appropriateness%20of%20Rate%20&%20Service%20Regulation%20of%20Commercial%20Ferries%20Operating%20on%20Lake%20Chelan_2010.pdf)

1 [T]here may be flexibility within the law for the Commission to take
2 an expansive interpretation of the private carrier exemption from
3 commercial ferry regulation. For example, the Commission might
4 reasonably conclude that a boat service offered on Lake Chelan (and
5 elsewhere) in conjunction with lodging at a particular hotel or resort,
6 and which is not otherwise open to the public, does not require a
7 certificate under RCW 81.84.[010].

8 Ferry Report at 15.

9 On October 19, 2011, the Courtneys filed this lawsuit challenging
10 Washington's regulation of commercial ferry activity under the Fourteenth
11 Amendment to the United States Constitution. The Courtneys' Complaint alleges
12 that the applicable statutes and administrative regulations, as applied to their
13 attempts to establish a competing ferry service on Lake Chelan, violate their right
14 to "use the navigable waters of the United States" under the Privileges or
15 Immunities Clause. The Courtneys have specifically limited their causes of action
16 to their rights under the Fourteenth Amendment's Privileges or Immunities Clause
17 and have expressly disclaimed reliance upon the Commerce Clause or any other
18 constitutional provision. Accordingly, the court will limit its analysis to whether
19 the Courtneys have stated a claim for relief under 42 U.S.C. § 1983 or 28 U.S.C. §
20 2201 *et seq.* for violations of a right guaranteed by the Privileges or Immunities
Clause of the Fourteenth Amendment.

DISCUSSION

A motion to dismiss pursuant to Federal Rule of Evidence 12(b)(6) “tests the legal sufficiency of a [plaintiff’s] claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive such a motion, a plaintiff must allege facts which, when taken as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation and citation omitted). In order for a plaintiff asserting a cause of action under 42 U.S.C. § 1983 to satisfy this standard, he or she must allege facts which, if true, would constitute a violation of a right guaranteed by the United States Constitution. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Similarly, a plaintiff seeking declaratory relief under 28 U.S.C. § 2201 must allege facts which, if true, would violate federal law. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (holding that Declaratory Judgment Act did not expand subject-matter jurisdiction of federal courts). As discussed below, Plaintiffs’ Complaint fails to satisfy these standards.

A. The “Right to Use the Navigable Waters of the United States”

The Courtneys have asserted two related causes of action. First, they allege that the State of Washington’s ferry licensing laws infringe upon their right to provide a commercial ferry service open to the general public on Lake Chelan. Second, they claim that these same laws infringe upon their right to provide a *private* ferry service for patrons of their Stehekin-based businesses. Plaintiffs

1 contend that their right to provide these services is guaranteed by the Fourteenth
2 Amendment's Privileges or Immunities Clause, which provides that "No State
3 shall make or enforce any law which shall abridge the privileges or immunities of
4 citizens of the United States." U.S. Const. amend. XIV, § 1.

5 In support of their claims, the Courtneys note that the Supreme Court has
6 specifically delineated "[t]he right to use the navigable waters of the United States"
7 as one of the "privileges or immunities" guaranteed to citizens of the United States
8 under the Fourteenth Amendment. *See Slaughter-House Cases*, 83 (16 Wall.) 36,
9 79-80 (1872). Defendants apparently do not dispute that *Slaughter-House*
10 established a Fourteenth Amendment right "to use the navigable waters of the
11 United States." Defendants argue, however, that this right does not extend to
12 operating a commercial ferry service because regulation of such services has
13 traditionally been reserved exclusively to the individual states.

14 At the outset, it is important to note that no federal court has ever directly
15 examined the "right to use the navigable waters of the United States" referenced by
16 the Supreme Court in *Slaughter-House*. Given the absence of applicable
17 precedent, this Court must attempt to define the "right to use the navigable waters
18 of the United States" before determining whether, on the facts alleged in the
19 Complaint, the right could have been violated. The logical starting point for this
20 analysis is the *Slaughter-House* decision itself.

1 In *Slaughter-House*, the Supreme Court was asked to decide whether a
2 Louisiana statute which granted to a single corporation the exclusive right to
3 operate a centralized slaughterhouse—to which all merchants were required to
4 bring their animals for slaughter—violated the Thirteenth or Fourteenth
5 Amendments. 83 (16 Wall.) at 66-67. Before embarking on that task, Justice
6 Miller, writing for a 5-4 majority, emphasized that the Court’s consideration of the
7 newly-adopted Thirteenth and Fourteenth Amendments must be informed by the
8 history and purpose of their adoption. *Id.* at 67-68, 71-72. According to Justice
9 Miller, “the one pervading purpose” of these amendments at the time of their
10 adoption was to ensure “the freedom of the slave race, the security and firm
11 establishment of that freedom, and the protection of the newly-made freeman and
12 citizen from the oppressions of those who had formerly exercised unlimited
13 dominion over him.” *Id.* at 71.

14 With the history and purpose of the amendments thus established, the Court
15 proceeded to consider whether the Louisiana statute violated the Privileges or
16 Immunities Clause of the Fourteenth Amendment. At the outset, the Court drew a
17 crucial distinction between rights and privileges created by *state* citizenship and
18 rights and privileges created by *United States* citizenship. *See id.* at 72-77.
19 Specifically, the Court noted that the Fourteenth Amendment protects only
20 “privileges or immunities of citizens of the *United States*” and that these rights are

1 *separate from* the “Privileges and Immunities” guaranteed to *state* citizens
2 referenced in Article IV. *Id.* at 78.

3 According to the *Slaughter-House* majority, the “privileges or immunities”
4 referenced in the Fourteenth Amendment are a narrow category of rights “which
5 ow[e] their existence to the Federal government, its National character, its
6 Constitution, or its laws.” *Id.* at 79. The “Privileges and Immunities” referenced
7 in Article IV, by contrast, are a broad category of “fundamental” rights conferred
8 by *state* citizenship, such as “protection by the government . . . the right to acquire
9 and possess property of every kind, and [the right] to pursue and obtain happiness
10 and safety.” *Id.* at 76, (emphasis omitted). Notably, the Court further emphasized
11 that the latter category of rights “embraces nearly every civil right for the
12 establishment and protection of which organized government is instituted.” *Id.*
13 (citing *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870)).

14 After drawing this crucial distinction between rights conferred by state
15 citizenship and rights conferred by United States citizenship, the Court concluded
16 that the right asserted by the petitioners—*i.e.*, the right to operate competing
17 slaughterhouse facilities⁴—was not a privilege of United States citizenship. *Id.* at

18 ⁴ The majority carefully noted that the Louisiana statute did not “deprive[] a large
19 and meritorious class of citizens . . . of the right to exercise their trade,” but merely
20 required all butchers “to slaughter at a specified place and to pay a reasonable

79. Rather, the Court concluded that this was an economic right conferred by *state* citizenship—a right that must yield to the lawful exercise of the state’s “police power.” *Id.* at 62, 78. Accordingly, the Court held that the Louisiana statute did not implicate the “privileges or immunities” protected by the Fourteenth Amendment. *Id.* at 80.

Before concluding its analysis of the “privileges or immunities” issue, however, the *Slaughter-House* majority took an unusual step: it enumerated certain rights which, though not implicated by the challenged statute, might nevertheless be protected under the Fourteenth Amendment.

Having shown that the privileges and immunities relied [upon by the petitioners] are those which belong to the citizens of the States as such, and that they are left to the State governments for security and protection, and not by [the Fourteenth Amendment] placed under the compensation for the use of the accommodation furnished to him at that place.” 83 U.S. (16 Wall.) at 60-61. Accordingly, the Court framed the right at issue not as the right to butcher animals in general, but rather the right of to operate competing slaughterhouse *facilities*. *Id.* at 61 (“[I]t is not true that [the statute] deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit . . . [i]t is, however, *the slaughter-house privilege*, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.”) (emphasis added).

1 care of the Federal government, we may hold ourselves excused from
2 defining the privileges and immunities of citizens of the United States
3 which no State can abridge, until some case involving those privileges
may make it necessary to do so.

4 But lest it should be said that no such privileges and immunities are to
5 be found . . . we venture to suggest some which own their existence to
6 the Federal government, its National character, its Constitution, or its
laws.

7 *Id.* at 78-79. The Court then proceeded to list several examples of rights that could
8 potentially be guaranteed by the Fourteenth Amendment. One such example was
9 “[t]he right to use the navigable waters of the United States, however they may
10 penetrate the territory of the several States.” *Id.* at 79.

11 B. Plaintiffs’ First Cause of Action: Operation of a Commercial Ferry Service
12 Open to the Public

13 Given the limited holding of the *Slaughter-House* case, this Court cannot
14 definitively conclude that the Fourteenth Amendment does in fact protect “the right
15 to use the navigable waters of the United States.” Because the *Slaughter-House*
16 majority merely “venture[d] to suggest” a number of rights that could be protected
17 under the Fourteenth Amendment—ostensibly to prevent the Privileges or
18 Immunities Clause from becoming a legal nullity—there is reason to question
19 whether “the right to use the navigable waters of the United States” is truly a
20 *recognized* Fourteenth Amendment right. The fact that no federal court has ever
directly examined the “right” further reinforces this uncertainty.

1 Nevertheless, even if the right does in fact exist, the court Cannot conclude
2 that the right extends to operating a commercial ferry open to the public on Lake
3 Chelan. At the Courtneys' urging, the Court has thoroughly reviewed the history
4 and purpose of the Fourteenth Amendment's Privileges or Immunities Clause. The
5 Courtneys are correct that the overarching purpose of the clause at the time of the
6 Fourteenth Amendment's adoption was the protection of the rights of newly-freed
7 slaves following the Civil War. *See Slaughter-House*, 83 (16 Wall.) at 71 (noting
8 that the "one pervading purpose" of the Thirteenth, Fourteenth and Fifteenth
9 Amendments was "the protection of the newly-made freeman and citizen from the
10 oppressions of those who had formerly exercised unlimited dominion over him").

11 There is less support, however, for the Courtneys' assertions that the
12 Privileges or Immunities Clause was designed to protect quintessentially *economic*
13 rights. While it is certainly likely that the oppression of former slaves in the wake
14 of the Civil War resulted in adverse economic consequences, there is little to
15 suggest that Congress viewed the Privileges or Immunities Clause as the primary
16 vehicle through which former slaves would achieve economic equality. Indeed,
17 the Courtneys' focus on the economic underpinnings of the clause appears to give
18 short shrift to the "one pervading purpose" of the Thirteenth, Fourteenth and
19 Fifteenth Amendments: to eliminate *all* forms of institutional oppression of former
20 slaves. *Id.* at 71.

1 Moreover, the Courtneys’ assertion that they have a Fourteenth Amendment
2 right to operate a ferry business on Lake Chelan is inconsistent with the *Slaughter-*
3 *House* decision itself. Like the right to operate competing slaughterhouse facilities
4 at issue in *Slaughter-House*, the right to operate a competing commercial ferry
5 service on Lake Chelan appears to derive from *state* citizenship rather than United
6 States citizenship. *Cf. Saenz v. Roe*, 526 U.S. 489, 502-03 (1999) (holding that
7 Fourteenth Amendment Privileges or Immunities Clause protects the right to travel
8 between states). Notwithstanding *Slaughter-House*’s suggestion that the right to
9 “use” the navigable waters of the United States derives from United States
10 citizenship, the holding of the case counsels that using such waters *in the manner*
11 *the Courtneys have proposed—i.e., to operate a competing commercial ferry*
12 *business—is one of the “fundamental” rights conferred by state citizenship. See id.*
13 *at 76* (holding that “the right to acquire and possess property of every kind”
14 originates from state citizenship and is therefore not protected under the Privileges
15 or Immunities Clause of the Fourteenth Amendment)⁵; *McDonald v. City of*

16 ⁵ The Court also notes that the *Slaughter-House* majority tacitly approved of an
17 exclusive ferry franchise by declining to address a portion of the Louisiana statute
18 which granted the slaughterhouse operator an exclusive right to run ferries on the
19 Mississippi River between its several buildings on both sides of the river. *See* 83
20 U.S. (16 Wall.) at 43. The minority approved of an exclusive ferry franchise more

1 *Chicago*, __ U.S. __, 130 S. Ct. 3020, 3030-31 (2010) (declining to revisit
2 *Slaughter-House*'s narrow interpretation of the rights protected under the
3 Privileges or Immunities Clause). Accordingly, the Court finds that the Courtneys
4 do not have a Fourteenth Amendment right to operate a commercial ferry service
5 open to the public on Lake Chelan.⁶

6 C. Plaintiffs' Second Cause of Action: Operation of a Private Ferry Service to
7 Patrons of Stehekin-Based Businesses

8 1. *Standing*

9 Article III of the United States Constitution limits the jurisdiction of federal
10 courts to cases or controversies between litigants with adverse interests. U.S.

11 explicitly: "It is the duty of the government to provide suitable roads, bridges, and
12 ferries for the convenience of the public, and if it chooses to devolve this duty to
13 any extent, or in any locality, upon particular individuals or corporations, it may of
14 course stipulate for such exclusive privileges connected with the franchise as it
15 may deem proper, without encroaching upon the freedom or the just rights of
16 others." *Id.* at 88 (Field, J., dissenting). However, the court expresses no opinion
17 as to the legality of an exclusive ferry franchise at this time.

18 ⁶ The Court expresses no opinion about whether the right to use the navigable
19 waters of the United States extends to "using" such waters for private
20 transportation services incidental to a land-based business.

1 Const. art. III, § 2, cl. 1. The overarching purpose of this provision is to prevent
2 federal courts from rendering advisory opinions in the absence of an actual dispute.
3 *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968). Consistent with this mandate, litigants
4 in federal court must establish the existence of a legal injury that is both “concrete
5 and particularized [and] actual or imminent.” *Lujan v. Defenders of Wildlife*, 504
6 U.S. 555, 560 (1992) (plurality opinion) (internal quotation marks and citations
7 omitted). To satisfy this requirement in an action for declaratory and injunctive
8 relief, a litigant must allege facts which “show a very significant possibility of
9 future harm.” *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.
10 1996). Accordingly, “[t]he mere existence of a statute, which may or may not ever
11 be applied to plaintiffs, is not sufficient to create a case or controversy within the
12 meaning of Article III.” *Stoinoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983).

13 Here, the Courtneys’ second claim does not present an actual case or
14 controversy under Article III. The Courtneys’ second claim is based on Clifford
15 Courtney’s proposal to the WUTC in 2008 for one of two alternative boat
16 transportation services. The first proposal was a “charter” service whereby
17 Clifford would hire a private boat to transport patrons of his lodging and river
18 rafting businesses between Chelan and Stehekin. The second proposal was a
19 service whereby Clifford would “shuttle” his customers (lodging and river rafting
20 patrons) between Chelan and Stehekin in his own private boat.

1
2 As the Courneys acknowledge in their complaint, the WUTC has never
3 definitively ruled that their proposed “private” ferry service would in fact require a
4 certificate of public convenience and necessity under RCW 81.84.010. While the
5 Court commends the Courtneys for their good-faith efforts to resolve this issue
6 with the WUTC over the past several years, it cannot ignore the fact that (1) the
7 WUTC has given directly conflicting opinions about whether a certificate would be
8 required; and (2) neither the WUTC nor any other state adjudicative body has ever
9 officially ruled on the matter. Accordingly, the Court finds that it lacks subject-
10 matter jurisdiction to entertain the Courtneys’ second cause of action at this time.
11 *San Diego Gun Rights Comm.*, 98 F.3d at 1126; *Stoinoff*, 695 F.2d at 1223.

12 2. Ripeness

13 Even if the Court had subject-matter jurisdiction, however, it would
14 nevertheless decline to consider the Courtneys’ second claim on prudential
15 ripeness grounds.⁷ In light of the lingering uncertainty about whether the

16 ⁷ During oral argument, counsel for the Plaintiffs correctly noted that the
17 Courtneys are not required to exhaust their administrative remedies before filing a
18 § 1983 claim. *Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 516 (1982). The
19 lack of an exhaustion requirement, however, does not relieve the Courtneys of their
20 obligation to establish that their claim presents a ripe controversy. *See McCabe v.*

1 Courtneys would be required to obtain a certificate of public convenience and
2 necessity to operate a private ferry service, the court concludes that further
3 consideration of the constitutionality of the challenged statutes at this juncture
4 would be premature. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991)
5 (postponing ruling on whether provision of the California constitution violated the
6 First Amendment where provision did not clearly apply to petitioners and where
7 “permitting the state courts further opportunity to construe [the provision could] ...
8 materially alter the question to be decided”) (internal quotation and citation
9 omitted). This conclusion is further reinforced by the WUTC’s most recent
10 pronouncement that “there may be flexibility within the law for the commission to
11 take an expansive interpretation of the private carrier exemption from commercial
12 ferry regulation.” *See Ferry Report* at 15. In light of the WUTC’s apparent
13 willingness to consider an interpretation of the statute that would not implicate the
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17 *Arave*, 827 F.2d 634, 639 (9th Cir. 1987) (“While there is no requirement that
18 administrative remedies be exhausted in cases brought under 42 U.S.C. § 1983, the
19 claim must be ripe, and not moot, to be reviewed properly.”) (internal citations
20 omitted).

1 Fourteenth Amendment, the court concludes that the Courtneys' second claim is
2 unripe for present adjudication.⁸

3 3. *Abstention*

4 Finally, even if the Courtneys' second claim was ripe for review, the Court
5 would abstain from deciding the constitutional question presented under the
6 "abstention doctrine" set forth in *Railroad Comm'n of Texas v. Pullman Co.*, 312

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8 ⁸The Court acknowledges that an as-applied challenge to RCW 81.84.010—which
9 the Courtneys have asserted in this case—is more likely to present a ripe
10 controversy than a facial challenge. *See, e.g., Brockett v. Spokane Arcades, Inc.*,
11 472 U.S. 491, 501-02 (1985) (articulating preference for deciding constitutional
12 questions on the facts of a specific case rather than in the abstract). Nevertheless,
13 when a § 1983 plaintiff asserting an as-applied challenge fails to seek a conclusive
14 determination as to whether the challenged statute will in fact be applied in the
15 manner asserted, a ripe controversy does not exist. *See Shelter Creek Dev. Corp. v.*
16 *City of Oxnard*, 838 F.2d 375, 379-80 (9th Cir. 1988) (dismissing as unripe an as-
17 applied constitutional challenge under § 1983 where plaintiffs never formally
18 applied for a special use permit, and, consequently, the defendant city never
19 rendered a "final and authoritative determination as to how the [challenged land
20 use] ordinance applied" to the plaintiffs' property).

1 U.S. 496 (1941). Under *Pullman*, a federal court must abstain from deciding a
2 federal constitutional question when the resolution of that question hinges on
3 competing interpretations of a state statute. *Id.* at 499-500. In such situations, the
4 “last word” on the meaning of the state statute belongs to the state courts. *Id.* The
5 reasons for this deference are twofold. First, deferring to a state court on a
6 question of state law prevents a federal court’s interpretation of a state statute from
7 being “supplanted by a controlling decision of [the] state court” at a later time. *Id.*
8 at 500. More importantly, however, this deference embodies a “scrupulous regard
9 for the rightful independence of the state governments.” *Id.* at 501.

10 As discussed above, Washington’s ferry certification requirement applies to
11 “commercial ferr[ies] . . . for the public use for hire.” RCW 81.84.010. Whether
12 this definition applies to the Courtneys’ proposed “private” ferry service remains
13 an open question. If the WUTC or the Washington State courts determine that the
14 proposed service *does* qualify as a “commercial ferry . . . for the public use for
15 hire,” then enforcement of the certificate requirement could potentially violate the
16 Courtneys’ Fourteenth Amendment rights. On the other hand, if either entity
17 determines that the proposed service *does not* qualify as a “commercial ferry . . .
18 for the public use for hire,” then the certificate requirement will not—indeed,
19 cannot—be enforced against the Courtneys. In the latter scenario, the Courtneys’
20 constitutional challenge to the certificate requirement is moot. Accordingly, the

1 court concludes that the Courtneys' second claim must be dismissed without
2 prejudice to afford the WUTC or the Washington State courts an opportunity to
3 resolve this unsettled question of state law. *Pullman*, 312 U.S. at 501.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 Defendants' motion to dismiss (ECF No. 7) is **GRANTED**. Plaintiffs' first
6 cause of action is **DISMISSED** with prejudice. Plaintiffs' second cause of action
7 is **DISMISSED** without prejudice. The District Court Executive is hereby directed
8 to enter this Order and furnish copies to counsel.

9 **DATED** this 17th day of April, 2012.

10 *s/ Thomas O. Rice*

11 **THOMAS O. RICE**
12 United States District Judge
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